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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

SECRETARY OF STATE OF MARYLAND
Petitioner,

v.

JOSEPH H. MUNSON COMPANY, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND

BRIEF FOR THE STATES OF CONNECTICUT, ILLINOIS, KANSAS, MASSACHUSETTS, NEW JERSEY, NEW YORK, PENNSYLVANIA, SOUTH DAKOTA, and TENNESEE AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI CURIAE

This brief is submitted pursuant to Rule 42 by Francis X. Bellotti, Attorney General of the Commonwealth of Massachusetts on behalf of Massachusetts and joined by the following other states:

Connecticut	Attorney General Joseph I. Lieberman
Illinois	Attorney General Neil F. Hartigan
Kansas	Attorney General Robert T. Stephan
New Jersey	Attorney General Irwin I. Kimmelman

New York	Attorney General Robert Abrams
Pennsylvania	Attorney General LeRoy S. Zimmerman
South Dakota	Attorney General Mark Meierhenry
Tennessee	Attorney General William M. Leech, Jr.

Each of these states has either common law or statutory regulatory jurisdiction over charitable funds and organizations.

This case marks the first time that this Court has reviewed a state charitable solicitation statute which regulates fundraising costs. While a number of cases have dealt with municipal ordinances governing various forms of in-person solicitation,[1/] the

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1/ Most recently in Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980).

constitutional limits on state regulatory schemes aimed at the administration of charitable fundshave never been delineated by this Court. This distinction is important because the states have a long standing and traditional role vis a vis charitable organizations. The amici will argue that their purposes in regulating charitable organizations extend beyond "the prevention of fraud" or "the prevention of undue annoyance" which are typically asserted on behalf of town ordinances regulating solicitation activity. Specifically, the state regulates the conduct of charities not only to insure that donors and donees are fairly treated but also to maintain an environment of confidence and an appearance of propriety in charitable endeavors.

Historically, the states' responsibility with respect to charitable funds was to see to their "due application" and to prevent breaches of trust in their administration. More recently, the transformation of charitable fundraising from what were primarily personal, face to face appeals to sophisticated and businesslike "boiler room" and mass mail appeals has necessitated regulation aimed particularly at fundraising practices. The Maryland statute under attack in this case is one such regulation.

The Maryland statute imposes a percentage limit on fundraising expenses which has two separate and distinct applications. First the twenty-five

percent limit serves to limit the amount a charity can spend on its own fundraising expenses. Thus a charity in Maryland which is aiming to raise $100,000 should not plan to incur more than $25,000 in fundraising expense. This limit insures that money raised for charitable purposes will not be applied to wasteful and inefficient fundraising schemes. The second is well illustrated by the facts of this case. The twenty-five percent limit serves to limit the percentage compensation of a professional solicitor such as Munson. If a charity permits a solicitor to use its name to raise funds from the public then the statute prohibits it and the solicitor from agreeing that the solicitor shall retain more than 25%.

This limit insures that funds donated to a charity inure primarily to the benefit of the charity rather than serving to enrich professional solicitors.

These two types of percentage limits are a common form of state fundraising regulation. They need to be treated separately because these two applications involve different policy and constitutional considerations. See Sections III and IV below. Indeed many states have adopted different limits for these two types of expenditure. See, e.g., Mass. Gen. L. c. 68, §21 (imposes a 15% limit on compensation for a professional solicitor) and Mass. Gen. L. c. 68, §22 (sets a 50% limit on the expenses incurred in connection with

fundraising activities).[2/]

The purpose of this amici brief is to explain the states' interest in regulating charitable fundraising and to defend the two types of percentage limitations described above. While the Schaumburg decision appeared carefully written to avoid a broad declaration that certain types of charities

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2/ Conn. Gen. Stat. §21a-179 (limits professional fundraisers to between 25% and 50%); Chpt. 23, §5109(c) Ill. Rev. Stat. (1981) (after deducting reasonable expenses, up to 25% of contributions can go to the fundraiser; 75% or more must go to the charity); N.J.S.A. 45: 17A-10(a) (imposes a 15% limitation on compensation for a professional fundraiser); Tenn. Code Ann. §48-2213(k) (limits professional solicitor compensation to 15% of gross contributions); Tenn. Code Ann. §48-2213(b) (fundraising costs in excess of 25% of gross contributions create a rebuttable presumption of unreasonableness).

regulation are not constitutionally permissible, the lower courts have not followed this Court's narrow approach. One federal court has construed this Court's decision as striking down all percentage limitations, even as the Maryland court appears to have ruled in the opinion prompting this appeal. Conlon v. City of North Kansas City, 530 F. Supp. 985 (W.D. Mo., 1981). But see Holloway v. Brown, 62 Ohio St. 2865, 403 N.E. 2d 191 (1980); National Black United Fund v. Campbell, 494 F. Supp. 748 (D.D.C. 1980). See also Bread Political Action v. Federal Election Commission, 635 F. 2d 629 (7th Cir. 1980); Larson v. Valente 452 U.S. 904 (1982). One state court has even gone so far as to construe Schaumburg as

mandating invalidation of a statute which limited fundraising expenses solely by limiting the percentage compensation which could be paid to a professional solicitor. State of North Dakota v. WRG Enterprises, Inc., 314 N.W. 2d 842 (N.D. 1982). Even beyond the confusion and uncertainties caused by these court decisions, certain sections of the charitable community have become convinced that Schaumburg stands for the proposition that charitable activities (and in particular those activities associated with solicitation) are constitutionally immune from any kind of regulation. See, e.g., Suhrke, Schaumburg: A Supreme Court Reminder of Basic Values, a Layman's Appraisal of Schaumburg, PHILANTHROPY MONTHLY, March 1980, at 4,4.

The states concede that any statutory scheme which as a practical matter bars certain types of charities from soliciting contributions is constitutionally infirm. The ordinance in Schaumburg not only fell within this rule but, in barring the special speech rights of advocacy groups, did so with a vengeance. Yet condemning the Schaumburg ordinance is a far cry from giving professional solicitors such as Munson a first amendment shield against any kind of state regulation or in particular regulation aimed at limiting his fee.

While the Maryland statute derives from a Uniform Act, like any piece of legislation it has its own unique features. For example, it is not common for charitable solicitation acts to

apply a percentage limit on fundraising expenses to the "total gross income raised or received by reason of the fund-raising activity." §103D(a). Nor is it common to exclude postal costs or feasibility studies from fundraising expense. Further the standard governing administrative exceptions is not uniform among the states.[3/] These particular

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3/ In Maryland the Secretary of State may exempt an organization from the percentage limitation "in those instances where the 25% limitation would effectively prevent the charitable organization from raising contributions." §103D(a). Other states employ rebuttable presumptions that costs in excess of a certain percentage are unreasonable. See, e.g., Tenn. Code Ann. §48-2213(b). Massachusetts employs a 50% limit and confers authority upon the Director of the Division of Public Charities to permit solicitation if she finds that such would be in the public interest. Mass. Gen. L. c. 68, §22. In most states administrative decisions are subject to due process hearing rights and judicial review.

aspects of the Maryland statute are best left to the parties to the case. The states as amici will confine their discussion to general considerations governing charities regulation and the first amendment standards applicable thereto. We urge this Court in deciding this case to recognize the propriety and constitutional validity of state regulations which impose precise and narrow limits on either the fundraising expenses of charitable organizations or on professional solicitors' fees.

SUMMARY OF THE ARGUMENT

The First Amendment requires that regulation affecting speech must serve a strong state interest and be narrowly drawn to serve that interest. (pp. 14-18)

The states have a strong and traditional interest in regulating public charities. In order to promote and protect charitable endeavor, the states have a responsibility to see to the actual and apparent integrity of charitable funds. (pp. 18-26)

As applied to charitable organizations flexible percentage limitations on fundraising expenses are narrowly drawn to promote public willingness to contribute to charitable causes. (pp 26-41)

As applied to professional solicitors such as Munson, percentage limitations on their compensation only serve to limit profits and do not have any obvious impact on speech. (pp. 41-57)

ARGUMENT

I. Percentage Limitations Are Constitutional Where They Serve a Strong State Interest Unrelated to the Suppression of Speech and Are Narrowly Drawn to Serve that Interest.

When a state acts to advance a significant governmental interest by regulating conduct and where the purpose of the regulation is unrelated to the suppression of free expression, a reviewing court need not strictly scrutinize the regulation as if it were a direct restriction on free speech. A two-fold test has been applied to determine the constitutionality of regulation indirectly affecting speech. If the regulation 1) serves a strong state interest unrelated to the suppression of speech and 2) has an

"incidental restriction on alleged First Amendment freedoms ... no greater than essential to the furtherance of that (non-speech) interest... " it is constitutional. U.S. v. O'Brien, 391 U.S. 367, 376 (1968). As Justice White noted in Broadrick v. Oklahoma, 413 U.S. 601 (1973), in applying the overbreadth doctrine, the function of the doctrine:

> ... attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from "pure speech" toward conduct and that conduct - even if expressive - falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful constitutionally unprotected conduct. Although such laws, if too broadly worded may deter protected speech to some unknown extent, there comes a point where that effect - at best a prediction - cannot, with confidence, justify

> invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe. Cf. Alderman v. U.S., 394 U.S. 165, 174-5 (1969). To put the matter another way, particularly where conduct and not merely speech is involved we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep. 413 U.S. at 615.

In considering regulation of charitable fundraising, it is important to keep in mind this spectrum of activities. Fundraising runs the full gamut of such activities ranging from those involving pure speech to those implicating gradations of expressive conduct to pure non-expressive conduct. Under certain circumstances, solicitation is an "intertwined"

activity, involving both speech and conduct. Schaumburg, 444 U.S. at 834. Regulation of this activity may focus more on its speech elements or on its conduct elements. Obviously a statute which allowed pro-abortion groups to solicit but denied a similar right to pro-choice groups would be at the speech end of the continuum.[4/] On the other hand, limits upon the fee of a for-profit professional solicitor must be conceded to be at the extreme "conduct" end of the spectrum. Falling somewhere in between are limits upon the fundraising expenses of charitable

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4/ Indeed to the extent that the ordinance in Schaumburg functioned to bar solicitation by a type of organization exercising predominantly speech rights, that ordinance too may be placed at the "speech" end of the spectrum.

organizations. The court below totally ignored these subtle distinctions. By applying a bright line test, it failed to give adequate weight to the strong state interests served by these limits.

II. The States Have a Strong and Compelling Interest in Regulating Charitable Organizations and Charitable Fundraising; the States' Interest Relates to the Encouragement of Charitable Speech and Not Its Suppression.

Dating from the enactment of the Statute of Charitable Uses in England in 1601, the state has recognized its unique regulatory responsibility vis a vis public charities. That statute not only spelled out the specific purposes which would be deemed charitable, it also set up a series of Commissions with broad powers to investigate and redress the misapplication of charitable funds. In addition, under English common law

the Attorney General was empowered to represent the public's interest in the proper use of charitable funds.[5/] Obviously part of the purpose of these enforcement efforts was to protect donors from the waste of their funds and to ensure the beneficiaries that they would receive the benefits intended for their use. Government intervention was necessary because charitable funds are by their very nature beneficial to the indefinite public. Thus if charitable trustees were legally accountable to all their potential private beneficiaries, charitable trusts could be depleted by the assertion of duplicative or even inconsistent legal claims.

5/ This was one of the areas under the common law where the Attorney General had power to act parens patriae on behalf of the public generally.

It cannot be disputed that Parliament in enacting the Statute of Charitable Uses had more in mind than the protection of individual donors and beneficiaries. This was after all at a time when caveat emptor was the general rule and the government had only limited inclination to intervene in private transactions. Most fundamentally, the Statute of Charitable Uses represented a recognition of the importance of voluntary charitable endeavors in lessening the burdens of government and in meeting community needs. This kind of philanthropy cannot survive except in an environment where people are assured that charitable money will be spent honestly and efficiently. Thus the government has a special interest not only in the integrity of the administration of charitable funds but also in its perceived integrity. Indeed

as a result of the enactment of the Statute in 1601, the number of charities rapidly increased. See Fremont-Smith, Foundations and Government, Russell Sage Foundation, 1965, p.28.

This interest in regulating charitable funds has continued to the present day. In many states, the attorney general has both a statutory and a common law responsibility to see to the due application of charitable funds.[6/] To aid the Attorney General in the discharge of these responsibilities public charities in many states are required by statute to

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6/ See, e.g., Mass. Gen. L. c.12, §8; Conn. Gen. Stat. §3-125; Chpt. 23, 5109(c) Ill. Rev. Stat. (1981); N.Y.E.P.T.L. 8-1.4(i)(m); Tenn. Code Ann. §29-35-102 (action by District Attorney for breach of duty by trustee of charitable trust). Parker v. May, 59 Mass. (5 Cush) 336 (1850).

file annual financial disclosure statements with a state attorney general or some other state agency.[7] Other typical requirements include a general provision that a state's attorney general must be made a party to certain judicial proceedings involving charities,[8] or to probate court proceedings concerning the administration of charitable funds and bequests,[9] In addition many

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7/ See, e.g., Mass. Gen. L. c.12, §8F. Conn. Gen. Stat. §21a-177; Chpt. 23, §5104 Ill. Rev. Stat. (1981); N.J.S.A. 45:17A-6; N.Y.E.P.T.L. 8-1.4(c)(f); N.Y. Exec. L. §172 and §172-v; Tenn. Code. Ann. §48-2204(a)(6). The requirement of financial disclosure was first imposed on charities in England in 1786 by the Return of Charitable Donations Act. See Fremont-Smith, supra, at 27.

8/ See, e.g., Mass. Gen. L. c.12, §8G; N.Y.E.P.T.L. 8-1.4(e); Tenn. Code Ann. §35-1108(b)(District Attorney).

9/ See, e.g., Mass. Gen. L. c.192 and M.G.L. c.206; N.J. Supreme Court R. 4:80-8 (requires notice); N.Y.E.P.T.L. 8-1.4(e)(2).

states retain broad power to investigate the misapplication of charitable funds.[10/]

Like traditional regulation of charitable funds, state charitable solicitation acts,[11/] have the dual purpose, on the one hand, of protecting donors and donees and, on the other, of promoting the public's perception of the integrity and efficiency with which charitable funds are raised. The percentage limitations at issue here relate directly to these concerns. The existence of fundraising schemes where a

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10/ See, e.g., Mass. Gen. L. c.12, §8H, 8L; Chpt. 23, §5110 Ill. Rev. Stat. (1981); N.Y.E.P.T.L. 8-1.4(i), N.Y. Exec. L. §175(e)(5); Tenn. Code Ann. §§48-2203(c), 2209.

11/ See, e.g., Mass. Gen. L. c.68, §§18-31; Conn. Gen. Stat. §§21a 175-190; Chpt. 23, §§5101-5114 Ill. Rev. Stat.; N.J.S.A. 45:17A 1-17; N.Y. Exec. L. Art. 7(a); Tenn. Code Ann. §§48-2201 et. seq.

for-profit business receives the donation and returns only some small percentage of it to the charity obviously corrodes the public's confidence and willing participation in charitable solicitations. Equally corrosive to public participation is the growing public perception that charitable donations are used only to solicit more charitable donations in seemingly endless waves of unwelcome "junk mail."

In this respect, percentage limitations in the area of charitable fundraising have a purpose similar to the political contribution limits upheld in Buckley v. Valeo, 423 U.S. 387 (1976). In that case, the Supreme Court noted that the state had a valid interest in protecting not only against corruption but also against the

appearance of corruption:

> Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contribution. Buckley, 423 U.S. at 28.

Similarly fundraising limits do more than shield charities from abuse by professional solicitors; they actually encourage the public to give by maintaining confidence in the integrity of the system.[12] Charitable speech is not chilled by such regulation; it is nurtured.

12/ It must be emphasized that percentage limitations are not primarily anti-fraud regulation. Other provisions in state statutes typically aim at fraud and misrepresentation. Likewise in Buckley the Court upheld a campaign contribution limit even though the Federal Election Campaign Act of 1971 had partially addressed fraud by imposing extensive disclosure requirements. Buckley, 423 U.S. at 29.

III. In Evaluating Maryland's Limit on The Fundraising Expenses of Charitable Organizations the Court Below Should Have Considered the Size of the Limit, the Standards by which Expenses are Allocated to Fundraising, and the Exercise of Administrative Flexibility in Enforcing the Limit.

A. The Maryland Court Misapplied Schaumburg in Reading it to Invalidate all Percentage Limitations.

As explained above the Maryland statute can function like the Schaumburg ordinance as a limit on the fundraising expense incurred by the charity. However the Maryland statute does not have the effect on speech rights which rendered the Schaumburg ordinance unconstitutional. The ordinance prohibited charitable organizations from any solicitation in that town unless 75% of the money raised went for a charitable purpose. "Charitable purpose" was defined to exclude not only

fundraising expenses but also the administrative expenses of the charity. Further the ordinance permitted municipal officials no administrative flexibility to allow solicitation if they found the organization's fundraising expenses to be reasonable under the circumstances. The effect of the Schaumburg ordinance was an absolute prohibition on the speech of certain legitimate organizations such as Citizens for a Better Environment, the plaintiff advocacy group. That group suffered a total loss of its speech rights because part of its charitable program (the activity of its advocate solicitors) was defined as non-charitable by the town. As will be shown below no such effect is possible under the Maryland statute.

B. The Maryland Court Failed to Give Adequate Weight to the The State's Strong Interest in Regulating Fundraising Costs.

As was argued above, state regulation of fundraising costs is an instance of the state's traditional concern that charitable funds not only be well managed but also that they appear to the public to be well managed.

Charities have many different ways of raising funds. Obviously some ways are more cost-effective than others and a charity which is reasonably managed may be expected to employ the most cost-effective means first. Thus, for example an organization which wishes to raise $100,000 may well find it can raise such an amount by a single mailing to its prior donors. If it wishes to raise more money, it must mail follow-up solicitations or tap new donors. Since

these techniques are normally less cost-effective, the fundraising percentage of the organization will go up as the charity seeks to raise more and more money. Even if marginal costs are 90%, the charity's total funds are increased by ten cents for every dollar raised. Many organizations engage in so called donor acquisition campaigns where the fundraising percentage exceeds 100 or even 200%. The point of these campaigns is to identify future donors for the organization.

These considerations indicate why fundraising costs have been singled out for special attention. With respect to each charitable organization there is no economic disincentive to discontinue fundraising at any point short of a marginal percentage cost (figuring not

merely present benefit but future benefit as well) of 99.9%. A charity's interest in fundraising is typically only extinguished when it actually incurs a net cost in the process. Yet if all charities were to fundraise in this way there would be disastrous consequences. First, at some point people feel inundated by unwanted charitable solicitations. Second, as the fundraising activities of charitable organizations became more visible than their programs, public cynicism about charitable giving would increase.

Fortunately most charities do not milk the public down to the last marginal cent. Instead they undertake balanced programs which seek in efficient ways to maintain the interest of prior donors and at the same time provide for reasonable growth in the

charity's donor base. Such charities will not run afoul of a reasonable percentage limit such as Maryland's absent unusual circumstances.

The states concede that there are some circumstances when a percentage limitation could reasonably be exceeded. An extremely unpopular cause is one frequently cited example. A unique opportunity to expand one's donor base as a result of a special accomplishment is another. Whatever the reason, it is not a decision which should be entirely left to the charity. It is human nature that those in charge of charitable organizations will frequently wish to raise as much money as possible. A charity with a strained budget may not grow as quickly as its principals would like or may not have the resources to be a beneficient

employer. Therefore the decision of how inefficient marginal fundraising must become before it is abandoned may be a situation which pits the self interest of a charity against the public whose dollars it spends.

An analogy may make this point clearer. Under for-profit corporation law, certain actions must be brought to the shareholders for vote or review. Chief among these are actions in which the board or officers might be said to have a personal stake. Salaries, the powers of the board, decisions over mergers or stock issues are typically within the shareholder's domain precisely because the board may have a personal interest. A charity, instead of being accountable to private shareholders, is accountable to the indefinite public. The state has

traditionally represented that public in being sure that the charity's transactions are lawful and are not inappropriately tinged with the self-interest of its officers. A flexible state percentage limit falls within this tradition by providing for an independent state review when a charity decides because of special circumstances to spend more than a certain amount of the public's money on its own dreams of expansion.

C. A Flexible Percentage Fundraising Limit Narrowly Serves the States' Interest in Regulation.

In deciding Schaumburg, this Court seemed to indicate that a percentage limit on fundraising expenses would be constitutional under certain circumstances if the regulation included discretion on the part of some state

official to allow solicitation even if the limit were exceeded. Indeed in a footnote the Court distinguishes the Schaumburg ordinance from the one upheld in National Foundation v. Fort Worth, 415 F. 2d 41 (5th Cir. 1969) cert. denied, 396 U.S. 1040 (1970). That case dealt with an ordinance which denied the right to solicit contributions to charitable organizations with excessive solicitation costs. The ordinance deemed costs in excess of twenty percent of gross receipts unreasonable but permitted organizations which demonstrated the reasonableness of such costs to obtain solicitation permits. In Schaumburg this Court distinguished National Foundation as follows:

> Unlike the ordinance upheld in National Foundation v. Fort Worth, the Village ordinance has no provision permitting an organization unable to comply with

> the 75 percent requirement to obtain a permit by demonstrating that its solicitation costs are nevertheless reasonable ... Thus the Village ordinance effectually bars all in-person solicitation by organizations who spent more than one-quarter of their receipts in the previous year on salaries and administrative expenses. Schaumburg, 444 U.S. at 636 fn. 9.

The Maryland statute, like the one upheld in National Foundation, utilizes a flexible fundraising percentage limit. Such limits, unlike the absolute limit struck down in Schaumburg, narrowly serve the states' interest in regulating fundraising costs.

State solicitation statutes are not enacted to place unnecessary restrictions on charitable speech. As was argued above the state interest in such statutes is not to stifle the speech of organizations with fundraising costs more than 25% but to subject the decision of a charity to spend more than

that figure to the impartial review of a state official. The discretion of the state official to permit the solicitation to go forward is what prevents the statute from being overbroad.

Nor is the discretion given to state officials under charitable solicitation statutes the kind of discretion condemned in Hynes v. Mayor of Oradell, 425 U.S. 610 (1976). For one thing, it is not unbridled discretion. An organization has an absolute right to solicit so long as it keeps its costs within certain reasonable limits. It is only when that limit is exceeded that a state official decides who may solicit and even then he is bound by certain standards, e.g. whether the costs are reasonable under the circumstances. Further a state

official's decision is normally subject to court review and cannot be made arbitrarily or capriciously.

A flexible percentage limit on fundraising costs operates to keep fundraising expenses at a reasonable level while at the same time providing relief for those organizations having a special need to spend larger amounts on raising money.

D. There was No Evidence Before the Maryland Court that Percentage Limitations on Fundraising Expenses Have a Significant Impact on the Speech Rights of Charitable Organizations.

Under the O'Brien standard some incidental effects on speech are permissible where the regulation in question serves a strong state interest which is unrelated to the suppression of speech. Munson in this case has failed to demonstrate that the statute has any

effect on speech, let alone that its effect is more than incidental. The advocacy oriented organizations identified by the circuit court in the Schaumburg case constituted a significant class of organizations who were absolutely barred under the ordinance from soliciting in the town of Schaumburg. The record in this case falls far short of documenting that the Maryland statute has this kind of effect. Indeed it does not establish that even one charity has been denied its right to solicit. Even Munson's clients remain free to solicit funds.

Percentage limitations on fundraising expenses may have varying degrees of impact on the speech rights of charitable organizations. The actual number of organizations coming within the sweep of such a statute is obviously

affected by the actual percentage employed. The lower the percentage, the larger will be the number of organizations affected. The sweep of a statute will also be determined by the rules used to allocate expenses to the fundraising function. The Schaumburg ordinance had an extremely unrealistic allocation between fundraising and program. The fundraising category included administrative expenses and one hundred percent of the salaries of the advocate-solicitors. The Maryland statute on the other hand employs generally accepted accounting principles §103B(a)(6) to allocate between fundraising and program. This results in what could be characterized as an overly generous measure of program expense by permitting a portion of the salaries of the advocate-solicitors to

be allocated to program. Thus insofar as an advocate's speech is implicated, the Maryland statute permits the organization to treat its cost as program. In addition the Maryland statute excludes from fundraising expense two major items - postage (§103D(b)(2)) and fundraising feasibility studies (§103D(a)).

The end result of the Maryland allocation rules is a much less restrictive limitation than that found in Schaumburg. There is no question but that Citizens for a Better Environment could solicit in the state of Maryland. CBE's fundraising percentage was 23.3% before deducting, as Maryland would, its postage and consulting expenses. 444 U.S. 624, 627. Surely the Maryland court was in error in ruling the Maryland statute unconstitutional absent

any showing that any charitable organization would be denied its right to solicit funds.

IV. Percentage Limitations on the Compensation of Professional Solicitors are Constitutional Because They Are Mere Economic Regulation of a For-Profit Business.

A. The Maryland Statute is Constitutional as it Applies to Munson and His Charitable Clients.

The Maryland statute as applied to Munson effectively functions as a limit upon his compensation. As applied it would be subject to constitutional attack only if it could be shown that limiting what a charity can pay a professional solicitor in any way limits the charity's ability to speak its mind. The amici contend first that Munson has failed to demonstrate that such limits have any significant impact on the speech rights of charitable

organizations and that they do not operate exclusively as a control upon his own excessive profits.[13/]

13/ The speech rights at stake here are of course those of the charitable organization not those of Munson. It is possible that a person soliciting for a charity could be exercising his own speech rights rather than serving solely as a conduit for the charity's speech. Fee limits on professional solicitors do not limit those speech rights which are protected by the first amendment. In reviewing regulation of lawyers, this Court has been careful to define when a lawyer's speech rises to first amendment protection. An attorney's speech is protected where the attorney has no pecuniary interest in the speech (solicitation) and where the litigation is a form of political expression or political association. In Re Primus, 436 U.S. 412 (1977); NAACP v. Button, 371 U.S. 415 (1962). The Court declared unconstitutional the lawyer solicitation regulation in Primus primarily because there was "... no basis for equating the work of lawyers associated with the ACLU or the NAACP with that of a group that exists for the primary purpose of financial gain through the recovery of counsel fees." Primus, 436 U.S. at 431. The plaintiff Munson is very unlike Attorney Primus. Munson has a direct and substantial pecuniary interest in the solicitation he conducts and a maryinal or non-existent interest in political expression or association.

Secondly, the amici argue that even if this overcharge provision had some impact on charitable speech it is well within the bounds of permissible regulation under the standards described in Section I.

B. Munson Has Not Demonstrated that A Percentage Limit on His Compensation Has Any Significant Impact on Charitable Speech.

There is no a priori reason to believe that percentage limits upon a solicitor's compensation will affect speech rights. Nor should this Court rely upon the plaintiff's bald assertions in this regard. Indeed relying upon the representations of the plaintiff in this case would be somewhat like taking the wolf's word that the sheep are safe. There is no indication upon this record that charities are

unable to hire solicitors within the 25% limit. A similar lack of evidence was noted in Buckley v. Valeo, 424 U.S. 6 (1976), where the Court upheld a limit on individual contributions to political candidates because "there is no indication ... that the contribution limits imposed by the Act would have any dramatic adverse effect on the funding of campaigns and political associations." 424 U.S. at 21.[14/]

14/ Similarly, in Person v. Association of the Bar of New York City, 554 F.2d 534 (2nd Cir., 1977) the court upheld a Bar Association rule which proscribed the payment of contingent fees to expert witnesses. It noted that the rule's "effect on first amendment rights, if any, is remote ... (it) does not deny attorneys or their clients access to the courts - it merely forces attorneys and litigants to finance the payment of experts in a manner not related to the outcome of the litigation." 554 F. 2d at 537. Likewise the Maryland statute regulates only the manner of financing speech and does not place a significant restriction on speech itself.

Likewise the Court in this case should be reluctant to hold or to suggest that a limit upon the compensation of a professional solicitor is unconstitutional absent some showing that such limits affect speech.[15/]

15/ While the burden of proof is not on the states, the amici submit two items which are highly suggestive that percentage fundraising is not important to the exercise of charitable speech rights. Exhibit A contains the Code of Ethics of the National Society of Fundraising Executives. This code bans "commission" fundraising entirely and requires its members to receive compensation "on the basis of a predetermined fee and not a percentage of the funds raised." Similarly, Exhibit B contains standards for charitable organizations promulgated by the National Information Bureau, a "watchdog" type organization which assists donors in obtaining information they need to make charitable giving decisions. The NIB standards also prohibit percentage fundraising. The fact that these industry organizations agree that a prohibition on percentage solicitation is desirable casts great doubt on Munson's claim that this kind of regulation has a significant impact on speech.

C. The States have a Strong Interest in Limiting Percentage Compensation for Professional Solicitors.

State statutes regulate professional solicitors in a variety of ways. Some provide that such solicitors shall be deemed fiduciaries for the amounts collected. Even in the absence of such a statutory provision solicitors fall into the traditional notion of a fiduciary as one who holds money for another. Statutes also frequently require that solicitors register and post a bond with a state agency. A bond is a fairly standard requirement for fiduciaries and one which is obviously aimed not only at protecting individual beneficiaries from breaches of trust but also at promoting confidence in the system. In addition, as noted above, percentage compensation for a solicitor

may be limited by state law. In a fiduciary context, external limitations on compensation are common. The reason for them is that a fiduciary's claim for compensation is the one area where he is permitted to have an interest which is adverse to that of his trust. Limits upon the compensation of a solicitor to what would appear to be a reasonable commission protect the charitable organization from overreaching conduct by solicitors and assures the public that money it donates will actually be applied to a charitable cause.

In connection with these purposes, two important points must be noted. First, it is not entirely an answer to the state's concern about the welfare of charitable organizations that the charity's own governing board has an obligation to protect the charity's

interests and that if it fails to do so the charity deserves its fate. This argument entirely overlooks the fact that charitable boards and trustees exercise their authority as stewards for the public. A failure by them to be careful and vigilant may irreparably harm the public interest.16/

16/ The irreparable nature of the public harm is well illustrated by a case recently arising in Massachusetts. In 1981, the President of the Boston Athletic Association executed a contract with one Marshall Medoff for him to solicit sponsorships for the Boston Marathon. Mr. Medoff was an immigration lawyer with little or no sports experience. The contract was executed without the knowledge or consent of the Board of Governors of the BAA but pursuant to a broad delegation of authority which may have been granted primarily as an expression of confidence in the President's personal leadership. The contract which had no fixed term provided that Mr. Medoff would pay a flat fee of $400,000 to BAA and that he could keep everything raised in excess

The second point which must be remembered is that a state may well conclude that if the purpose of limiting a solicitor's fee is to maintain confidence in the system of

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Footnote 16 (cont.)
of that amount. In 1982, this netted him over $300,000. Under Mass. Gen. L. c.68, §21 the compensation of a professional solicitor is limited to 15%. Pursuant to that section, the Director of the Division of Public Charities disapproved the contract between the BAA and Medoff. Before that had occurred however word had leaked out through the media the the Marathon had been secretly sold. The effect of these media reports were exacerbated by public statements by Medoff to the effect that the Marathon now belonged to him. Many runners and other volunteers have indicated an understandable lack of willingness to participate in the race so long as the primary beneficiary of their efforts is apparently Medoff. In the absence of a law requiring review and approval of percentage solicitation contracts it is a poor answer to the public that protection of their interest in an historic and important race is solely the province of its private part-time board.

charitable fundraising then this purpose cannot be fulfilled by mere disclosure. Indeed a state may also conclude that requiring solicitors to disclose that they themselves will keep 75% to 85% of any donation will not promote the public's willingness to involve themselves in charitable endeavors.

Lastly the states have a special interest in regulating professional fundraisers who operate for a percentage of the money raised. Most state statutes which place a limit on professional compensation make a distinction between professional solicitors who actually solicit funds for a percentage of the take and professional fundraising counsel who provide advice for a flat fixed fee. The solicitor's percentage compensation is restricted while generally the

charity may pay a fundraising counsel as much as it wishes so long as the payment is in the form of a "flat fixed fee."[17/] The reason for the distinction in treatment of the two types of professional fundraisers is that when the charity pays a flat fee, it bears a risk and must make a business judgment about the value of the services being offered. On the other hand, when a solicitor offers to run the whole fundraising campaign for a percentage, the charity may view this as "found money" in the sense that it bears no risk in obtaining it. In such cases, a charity may think it is getting the best

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17/ In Maryland, fundraising feasibility studies, the service usually provided by fundraising counsel, are not subject to the 25% limit. §103D(a).

of deals - something for nothing. Nevertheless it is a poor deal for the public which finds itself contributing primarily for private profit.

D. The Incidental Effects on Speech (if any) of Limiting Solicitor Compensation Are No Greater Than Necessary to Achieve the States' Regulatory Aim.

The regulation of professional solicitors does not place unnecessary burdens on speech. Courts have frequently held that burdens placed on speech may be necessary to fulfill the state's responsibility to maintain professional standards. The O'Brien standard has been used to uphold regulation of professionals even where there is a real burden on the most highly protected speech. See Ohralik v. Ohio State Bar, 436 U.S. 447, 460

(1978); Williamson v. Lee Optical Company, 348 U.S. 483 (1955); Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608 (1935); American Trial Lawyers v. New Jersey Supreme Court, 66 N.J. 258, 330 A.2d 350 (1974); Gair v. Peck, 6 N.Y. 2d 97, 160 N.E.2d 43 (1959); Commission on Independent Colleges and Universities v. N.Y. Temporary State Commission, 534 F. Supp. 489 (N.D.N.Y. 1982). Indeed the Court has recognized that the regulation of professionals enjoys a special status vis a vis first amendment claims. Cohen v. Hurley, 366 U.S. 117, 124 (1961).

Percentage limitations on a professional solicitor's fee involve the same considerations and principles which have led many states and the federal government to prohibit or limit

contingency fees for lawyers under certain circumstances. For example, contingent fees have been limited or disallowed in areas where the state wishes to protect a class of litigants - such as plaintiffs in workmen's compensation actions or parties in divorce cases. Mass. Gen. L. c.152, §13 (1957); Ind. Ann. Stat. §40-1516 (1952); Del. Code Ann. tit. 19, §2126 (1953) (workmen's compensation). Mass. Supreme Judicial Court Rule 3:05 (3), Contingent Fees (divorce). In addition, general percentage limits have been placed upon the compensation a lawyer may receive. See, e.g., New Jersey Supreme Court Rule 1:21-7(c). See also the Federal Tort Claims Act, 28 U.S.C. §2678 (1970) (limits contingent fees to twenty-five percent of the administrative settlement

after commencement of court proceedings or the judgment).

These limits on contingent fees have been upheld even though they clearly have an adverse effect on the first amendment rights of some potential clients. Contingent fees allow some clients access to the courts that would otherwise not be available, ATL v. N.J. Supreme Court, 66 N.J. 258, 330 A.2d 350 (1974); Swartz and Mitchell, An Economic Analysis of the Contingent Fee in Personal Injury Litigation, 22 Stan. L. Rev. 1125 (1970), and certainly access to the judicial system and representation by competent counsel are among the most fundamental of rights. Despite this, contingency fee limits are permitted in order to protect a lawyer's clients and to maintain the integrity

and the appearance of integrity in the legal profession.

The analogy between percentage limits on solicitors' fees and legal contingency fee regulation is particularly close. Both sets of rules regulate for-profit professions where the services performed are frequently fiduciary in nature. The percentage limits on solicitors' fees like contingent fee limits are necessary to protect vulnerable third parties from the dangers inherent in a situation where one seems to be getting something for nothing. The lure of risk-free percentage fundraising can easily induce a charity to sell its most valuable assets - its good name and its charitable appeal - to a professional

solicitor without making a reasoned financial decision.

Similarly contingency fees are attractive to some because they seem to cost the client nothing. As this Court has noted, such fees "tempt ... (potential clients) with what sound(s) like a cost-free and therefore irresistible offer." Ohralik, 436 U.S. at 467. Like contingency fees, percentage limits on the solicitor's share of the money donated to the charity should be upheld both to protect individual donors and charities and to maintain public confidence in charitable fundraising.

CONCLUSION

For all the foregoing reasons, the judgment of the court of appeals for the state of Maryland should be reversed and Munson's complaint should be dismissed.

Respectfully submitted,

Francis X. Bellotti
Attorney General
Commonwealth of
Massachusetts

Catharine W. Hantzis
Leslie G. Espinoza
Dana L. Mason
Assistant Attorneys General
Commonwealth of
Massachusetts

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Contributions to the NIB

NIB depends upon annual contributions from large and small givers to finance its work to maintain and improve standards and practices in its field of philanthropy. Supporting accountability in philanthropy should be an integral part of everyone's philanthropic giving. Contributors are asked to give at a level appropriate to their giving for charitable purposes and to their commitment to maintaining standards in philanthropy.

NIB support comes from individuals, foundations, national and local business corporations, religious organizations, media, chambers of commerce, better business bureaus, government agencies and affiliates of United Way of America in communities in the U.S. and Canada.

NIB annual contribution levels are:

General Contributor	
Individual	$25 and over to $100
Business/Foundation	$50 and over to $100
Regular Contributor	over $100 to $1,000
Major Contributor	over $1,000 to $5,000
Sustaining Contributor	over $5,000

All NIB contributors will receive occasional memos and Wise Giving Bulletins containing information of interest to concerned givers.

Whatever contribution you are able to make, we warmly welcome your support to help improve the quality of philanthropy through our standard maintenance work.

Contributions to the NIB are deductible for Federal income tax purposes.

For more detailed information about the NIB, please ask for a copy of our Annual Report.

Basic Standards In Philanthropy

Philanthropic organizations have a high degree of responsibility because of the public trusteeship involved. Compliance with the following standards, with reasonable evidence supplied on request, is considered essential for approval by the NIB:

1. **BOARD** — An active and responsible governing body, holding regular meetings, whose members have no material conflict of interest and serve without compensation.
2. **PURPOSE** — A clear statement of purpose in the public interest.
3. **PROGRAM** — A program consistent with the organization's stated purpose and its personnel and financial resources, and involving interagency cooperation to avoid duplication of work.
4. **EXPENSES** — Reasonable program, management and fund-raising expenses.
5. **PROMOTION** — Ethical publicity and promotion excluding exaggerated or misleading claims.
6. **FUND-RAISING** — Solicitation of contributions without payment of commissions or undue pressure, such as mailing unordered tickets or merchandise, general telephone solicitation and use of identified government employees as solicitors.
7. **ACCOUNTABILITY** — An annual report available on request that describes program activities and supporting services in relation to expenses and that contains financial statements comprising a balance sheet, a statement of support/revenue and expenses and changes in fund balances, a statement of functional expenses, and notes to financial statements, that are accompanied by the report of an independent public accountant. National organizations operating with affiliates should provide combined or non-profit compiled financial statements prepared in the foregoing manner. For its analysis NIB may request disclosure of accounting treatment of various items included in the financial statements.
8. **BUDGET** — Detailed annual budget approved by governing body in a form consistent with [illegible]

Wise Giving

for contributors

NATIONAL INFORMATION BUREAU, INC.

NIB

Not For Profit
419 Park Avenue South
New York, NY 10016
212-532 [illegible]

EXHIBIT A

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Wise giving is important

Americans gave an estimated $3.6 billion dollars to charitable, philanthropic and religious organizations in 1981. Most of these organizations are sound, but unfortunately some are not. A few are outright frauds. Others are guilty of mismanagement or of irresponsible use of contributed funds.

To protect their giving, many thoughtful contributors support voluntary compliance with standards of performance in philanthropy. Accountability to the public can help wise giving.

This is the NIB

Since 1918, the National Information Bureau has offered contributors an impartial advisory service reporting on hundreds of organizations that solicit contributions nationally from the general public.

NIB is a not-for-profit, independent watchdog organization to help keep philanthropies in its field true to the ideals and standards that should characterize all charitable organizations. It has not only exposed flagrant charity abuses but also has not hesitated to question the unethical practices of some of the giants in the field. NIB represents the point of view of prospective contributors in fulfilling its two-fold purpose:

- To maintain sound standards in its field of philanthropy;
- To aid wise giving through advisory reports to contributors.

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NIB reports

NIB prepares individual reports on over 300 national, not-for-profit organizations. It evaluates the agencies against NIB's eight basic standards and where feasible concludes that they meet or do not meet these standards.

NIB reports are usually four to nine pages in length with NIB's comment and conclusion on the front page. The body of each report generally contains:

- a brief statement of the agency's origin and purpose
- a description of its program activities
- a listing of its controlling Board and paid staff head
- an analysis of the agency's financial statements
- information on its tax deductibility status, salary ranges and current budget.

NIB reports about agencies with programs in such fields as:

animal protection • conservation
economics • education • health • youth
international relief and development
legal defense • minorities • social welfare

NIB does not generally undertake to report about religious, fraternal or political organizations and single or local institutions. However, NIB reports about the social welfare activities of some of these organizations and institutions which solicit contributions from the general public nationally.

NIB reports are available to the general public on written request. Up to three NIB reports may be requested at a time without charge.

Contributors to the NIB at the General level or higher may receive any number of available reports at a time, by written or telephone request.

NIB's Wise Giving Guide

NIB's Wise Giving Guide lists the agencies about which NIB prepares reports and indicates its evaluations of those agencies against NIB's standards. The Guide is published monthly to provide up-to-date evaluations. Single copies are available free on written request from the NIB.

An individual or group may purchase a single copy to be sent each month as published for $3 a year. Quantity rates are also available. (Purchases are not tax deductible as contributions.)

Contributors of over $100 may request the Wise Giving Guide be sent automatically to them monthly.

Are YOUR contribution dollars supporting . . .

. . . an organization which allows officers to use uniformed government employees to solicit the public? This practice puts undue pressure on contributors.

. . . an organization whose fund-raising expenses were recently more than 50% of contributions received and whose available assets were more than 2½ times its budget for the next year?

. . . an organization which in a recent year has only one in-person meeting of its governing body, which made payments of direct and indirect compensation to members of its Board and which owed to its Chairman about $1,000,000 on a demand basis?

PROTECT YOUR PHILANTHROPIC DOLLAR SUPPORT THE NIB

EXHIBIT B

AFFIDAVIT

OF

GAIL THACHER

NOW COMES your affiant, GAIL THACHER, who being duly sworn, hereby deposes on oath and says as follows:

1. I, GAIL THACHER, am a resident of Boston and am employed in the Development Office, Simmons College, 300 The Fenway, Boston, Massachusetts.

2. I am also a member and President-elect of the Massachusetts Chapter of the National Society of Professional Fundraising Executives.

3. Through those connections with the Society, I am aware of a Code of Ethics for fundraisers which has been developed and published by the Society.

4. The photostatic copies attached to this Affidavit are true and accurate copies of that Code of Ethics as published by the Society.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS third DAY OF February, 1983.

Gail Thacher

Then appeared personally before me the above-named Gail Thacher, known to me, who made oath to the truth and accuracy of the foregoing to the best of her knowledge and belief as her own free act and deed.

Lorna M. Lawley
Notary Public

My Commission Expires: 11/25/88

Code of Ethics and Professional Practices

Preamble

Professional fund raising executives are motivated by positive forces. By an inner drive to improve the society in which they live through the causes they serve. They seek to inspire others through their own sense of dedication and high purpose. They are committed to the improvement of their own professional knowledge and skills in order that their performance will better serve others. They recognize their trusteeship — to assure their employers that needed resources are responsibly sought and donors that their purposes in giving are honestly fulfilled. Such professionals write their own code of ethics everyday.

PROFESSIONAL FUND RAISING EXECUTIVES ACCEPT AND ABIDE BY THE FOLLOWING CODE OF ETHICS AND PROFESSIONAL PRACTICES

Members shall be responsible for conducting activities in accord with accepted professional standards of accuracy, truth, integrity and good faith.

Members shall encourage institutions they serve to conduct their affairs in accordance with accepted principles of sound business management, fiduciary responsibility and accounting procedures, to use donations only for the donors intended purposes and to comply with all applicable local, state, provincial and federal laws.

Members shall manage all accounts entrusted to them solely for the benefit of the organizations or institutions being served.

Members shall recommend to the institutions they serve only those fund raising goals which they believe can be achieved based on their professional experience and an investigation and rational analysis of facts.

Members shall work for a salary, retainer or fee, not a commission. If employed by a fund raising organization, that organization shall operate on its client-consultant relationship on the basis of a predetermined fee and not a percentage of the funds raised.

Members shall make full disclosure to employers or clients of all received compensation and relationships which might pose or appear to pose possible conflicts of interest. As fund raising executives, they will neither seek nor accept finder's fees.

Members shall hold confidential and each of their clients' records and documents acquired in the service of current or former employers and clients.

A member's public demeanor shall be such as to bring credit to the fund raising profession.